No. 99-1264

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

JAMES H. BROWN, III — PETITIONER

versus

MICHAEL O'DEA, WARDEN
EASTERN KENTUCKY CORRECTIONAL COMPLEX
RESPONDENT

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT, MICHAEL O'DEA, WARDEN, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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BRIEF FOR RESPONDENT, MICHAEL O'DEA, WARDEN, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Comes the Respondent, Michael O'Dea, Warden, by counsel, and pursuant to Order of this Court submits this brief in response to the petition for a writ of certiorari.

OPINIONS BELOW

a. Brown v. O'Dea, 187 F.3d 572 (6th Cir., 1999)

b. Brown v. O'Dea, E.D.Ky., Civil Action No. 97-30 (1997) (Judgment adopting the Report and Recommendation of the Magistrate Judge filed on September 30, 1997; Report and Recommendation filed on August 22, 1997)

c. Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996)

d. Brown v. Commonwealth, Ky., 639 S.W.2d 758 (1982)

COUNTERSTATEMENT OF THE CASE

A. Summary of Procedural History

Respondent accepts Petitioner's Summary of Procedural History except that Petitioner, in his Sixth Circuit proceedings, failed to properly raise the four issues that the Sixth Circuit did not address. Petitioner failed to raise the four issues in his original brief before the Sixth Circuit and only raised them for the first time in his reply brief. Respondent argued that Petitioner waived those issues and that the issues were not properly before the Court. The Sixth Circuit did not address the four issues.

B. Counterstatement of the Facts

On May 17, 1976, Mark Brown, Petitioner's brother, discovered that his house in Maysville had been broken into and some drugs that he possessed had been stolen. Mark told Steve

Lofton that when he found out who had ripped him off he was going to blow their head off.

Mark told Robert Collins on Monday, May 17, that his house had been broken into the day before. Mark told Collins that $1,000 worth of drugs had been taken. Collins told Mark and Petitioner, who was present for the conversation, that he had seen Bryant Dudley, the victim herein, walking beside Mark's house the previous evening. Mark, Petitioner, and Collins then picked Dudley up and went riding in Petitioner's car. Mark talked to Dudley about Dudley breaking in and stealing Mark's drugs. Mark had a .45 caliber, automatic Colt pistol in his hand and was pointing it in Dudley's general direction. Dudley denied committing the crime. Collins asked to be taken back to his car when Mark pulled the pistol out. When Collins left their company Petitioner, Mark, and Dudley were still together.

Mark told Chan Warner, on Tuesday, May 18, that he was looking for Dudley, that he knew who had committed the crime, and that he was going to get them. Mark was with Petitioner in Petitioner's car when Warner spoke to him.

Anna Corde, Dudley's girlfriend, was with Dudley at her house on May 18. Mark came by between 10:00-11:00 p.m. looking for Dudley. Dudley spoke with Mark outside and then came back in and told Corde that he was going with Petitioner and Mark to "do some chemicals." Dudley had on a T-shirt, long jeans over top of cut-off jeans, and tennis shoes.

Steve Bowles, Craig Burrows, Mike Crawford, and Jim McHugh stopped at Mark's house between 11:30 p.m. and Midnight on May 18. Petitioner, Mark, and Dudley were present. Mark and Dudley were in the kitchen snorting (inhaling) a drug and appeared high, and Petitioner was in the living room and seemed okay. Mark and Petitioner said they were on their way to Lexington, so the four only stayed for 15-20 minutes. Petitioner, Mark, and Dudley remained at the apartment when the group of four left.

That is the last time anyone admitted to seeing Dudley alive. Petitioner later gave a statement in which he said that he told Dudley that he would give him a ride home after the group of four left, but Dudley walked outside several minutes before Petitioner was ready, and when Petitioner got outside he could not find Dudley. Petitioner

said he waited a while for Dudley to return, but when he did not Petitioner left for Lexington.

Petitioner and Mark arrived at the Lexington apartment of David Tubbesing, David Kearns, David Wise, and Greg Haggard at around 3:00-3:30 a.m. on May 19. Petitioner and Mark had been drinking. They slept and were at the apartment when Tubbesing, Wise, and Haggard got home from working overnight. That day Mark went outside to the car and the occupants heard a shotgun blast. Mark said he had been checking the safety on a shotgun. Petitioner and Mark were driving Petitioner's car.

Roy Hutchison lived in the same Lexington apartment complex as Tubbesing, Kearns, Wise, and Haggard. He also saw Petitioner and Mark on May 19. Hutchison, Petitioner, and Mark walked to Hutchison's apartment as Petitioner and Mark readied to return home. Petitioner wanted to know if Hutchison would like to buy the boots Petitioner was wearing. Hutchison declined, but said he would trade an old pair of boots for Petitioner's boots. They completed the trade. Petitioner's shirt had a hole near the bottom so Hutchison also gave Petitioner a shirt to wear. Later, when

Hutchison heard rumor's of Dudley's disappearance, he examined the boots and noticed a stain on them.

Early Saturday morning, following Dudley's disappearance on Wednesday morning, Robert Collins went with Mark to Morton's Lane to look for Dudley's body in order to bury it. They looked for the body just off the side of the road, but they could not find it. Mark said he could not remember where they had killed Dudley.

The authorities found Dudley's body along Morton's Lane on May 27, 1976. Dudley had died as a result of two shotgun wounds to his back. The body was behind a fence, covered by weeds and briers. The body had on a T-shirt which was pulled up under the arm pits and a pair of cut-off jeans which were below the knees. On the other side of the road they found a pair of pants, two wool socks, two tennis shoes, a paper towel with blood on it, and a Michelob beer can. They also found a suspicious tire print, from which they made a plaster cast, and two .45 caliber shell casings. Finally, a bloody area was found on the road.

Petitioner's shotgun, a double-barrel, 12 gauge Stevens shotgun, and three live and one spent #6 shot Federal shotgun shells

were recovered from Robert Poe, who had been given them by Petitioner's mother.

Mark's apartment was searched where a roll of paper towels, which looked like the paper towel found at the crime scene, was recovered. The search also uncovered an empty shotgun shell box (#6 shot Federal) and two live shells of #6 shot Federal. Finally, the search uncovered Michelob beer cans of the same type as the can found at the crime scene.

Petitioner's boots and shirt were retrieved from Roy Hutchison.

Dudley's autopsy recovered from the body the wadding from two shotgun shells and some lead pellets. A firearms examiner, Ralph Gramke, determined the wadding to be from Federal 12 gauge shotgun shells and the pellets to be #6 shot. As a result of the wadding being found inside the body, Gramke determined the shots were fired from less than 4-5 yards.

Gramke also examined the two .45 caliber casings found at the crime scene. The casings had been fired from a Colt automatic, but not from the pistol found when Mark was arrested. However, Robert Collins testified that Mark owned a .45 caliber pistol before

Dudley disappeared, but not the pistol found when Mark was arrested which was a pistol Collins had sold to Mark for Petitioner after Dudley disappeared. Mark told Collins that Mark's pistol had been buried, but that he could get it anytime he wanted it.

A Criminalist, William Schrand, examined Dudley's cut-off shorts, Petitioner's boots, the paper towel found at the crime scene, and a soil sample from the bloody area at the crime scene. All the items had Type A blood on them. Schrand also compared the plaster cast of the tire print found at the crime scene with the tires on Petitioner's car. The cast was similar to Petitioner's tires, but was not distinctive enough to rule out other tires.

Jerry Conley was in jail with Petitioner and Mark following their arrests. They offered Conley $1,000 to kill Robert Collins so that he could not testify at trial. Mark made the verbal offer and Petitioner agreed with Mark by shaking his head. The mother of Petitioner and Mark would have given Conley the money.

The final Commonwealth's witness, Dr. Robert Shaler, testified that both Dudley and Petitioner had Type A blood. Dr. Shaler further stated that the blood on Petitioner's boots could not have been Petitioner's blood, but it was possible that it was the blood

of Dudley. Dr. Shaler emphasized on cross-examination, however, that he was not saying that the blood on the boots was Dudley's blood.

Petitioner was convicted of Murder[1] and sentenced to twenty years imprisonment on October 15, 1976. Mark was convicted, at a separate trial, of Murder, on the theory that he conspired with Petitioner to kill Dudley and that Petitioner then killed Dudley with a shotgun, and was sentenced to twenty years imprisonment. Brown v. Commonwealth, Ky., 555 S.W.2d 252, 253 (1977). On appeal, the Supreme Court of Kentucky affirmed Petitioner's conviction, but remanded the case for re-sentencing. Brown v. Commonwealth, Ky., 639 S.W.2d 758, 761 (1982).

Petitioner, who was free on bond pending appeal, failed to appear for re-sentencing, and instead decided Australia (as opposed to prison) would be his residence for the next ten years. Petitioner was arrested on May 23, 1993. Petitioner filed a Motion Pursuant to CR 60.02(f) to Vacate Judgment on June 21, 1993. On July 21, 1993, Petitioner was convicted of Murder and sentenced to twenty years

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[1]It appears that the jury found guilt on the theory of Wanton Murder.

imprisonment. On July 28, 1993, the trial court denied Petitioner's motion to vacate his judgment.

On appeal, the Kentucky Court of Appeals affirmed the trial court's denial of Petitioner's CR 60.02 motion, on December 2, 1994. The Supreme Court of Kentucky granted discretionary review and on August 29, 1996, also affirmed the trial court's decision. Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996).

ARGUMENT[2]

I.
THE AEDPA STANDARD OF REVIEW WAS CORRECTLY APPLIED TO THIS CASE.

Petitioner argues that his current petition for writ of habeas corpus is just a continuation of his 1994 petition for writ of habeas corpus which was dismissed for failure to exhaust his state court remedies. Petitioner's position is an attempt to avoid the

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[2]Underpinning all of the Respondent's arguments is the position, supported by Judge Merritt of The Sixth Circuit, that Petitioner, by fleeing to Australia for ten years to escape imprisonment, has forfeited his right under the fugitive disentitlement doctrine to challenge his conviction in the court systems. Brown v. O'Dea, 187 F.3d at 580-83. Judge Merritt found that Petitioner's actions were a direct affront to the Sixth Circuit since he was free at the time he took flight as a result of The Sixth Circuit granting his petition for writ of habeas corpus in 1980. Id.

standard of review set forth in the AEDPA. However, the dismissal of Petitioner's 1994 petition effectively ended that litigation. Farmer v. McDaniel, 98 F.3d 1548, 1552-53 (9th Cir., 1996), abrogated on other grounds, Slack v. McDaniel, ____ U.S. ____, 120 S.Ct. 1595, 1605-06, ____ L.Ed.2d ____ (2000). Only with the filing of his current petition after the AEDPA was enacted did this litigation begin. The 1994 petition was not in some manner still pending. Petitioner's filing of the current petition began this litigation. See Williams v. Coyle, 167 F.3d 1036 (6th Cir., 1999). Several other circuits have ruled against Petitioner's position. Mancuso v. Herbert, 166 F.3d 97 (2nd Cir., 1999); Graham v. Johnson, 168 F.3d 762 (5th Cir., 1999). This Court has implicitly recognized respondent's position in Slack v. McDaniel, ____ U.S. ____, 120 S.Ct. 1595, 1605-06, ____ L.Ed.2d ____ (2000).

II.

THE SIXTH CIRCUIT PROPERLY GAVE DEFERENCE TO THE JUDGMENTS OF THE STATE COURTS AS REQUIRED BY THE AEDPA.

This court in Williams v. Taylor, ____ US ___, 120 S.Ct. 1495, 1523, ____ L.Ed.2d ___ (2000) held:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

This standard differs from the standard adopted by the Sixth Circuit in Nevers v. Killinger, 169 F.3d 352 (6th Cir., 1999) and purportedly used in the case under consideration. However, the Sixth Circuit in actually deciding the issues in this case applied a standard very similar to that adopted by this court in Williams v. Taylor, *supra*. The Sixth Circuit stated in discussing Dr. Shaler's testimony, "we cannot conclude that the Kentucky Supreme Court's decision that petitioner was not denied a fundamentally fair trial was 'so arbitrary'

as to be outside the range of 'plausible outcomes.'" Brown v. O'Dea, 187 F.3d at 579. The Sixth Circuit further stated in regard to Dr. Shaler's testimony, "We do not conclude that the Kentucky Supreme Court's decision that petitioner was not denied a fair trial was so 'arbitrary' as to be outside the range of 'plausible outcomes.'" Id. With regard to the continuance issue the Sixth Circuit stated, "We conclude that the state court's decision on this claim was not so 'arbitrary' as to be implausible, ..." Id. at 580. The standard used by the Sixth Circuit in this case gave the proper deference to the state court judgment as required by the AEDPA and does not conflict with this Court's ruling in Williams v. Taylor, *supra*. Petitioner's argument effectively calls for the federal courts to operate as superior state courts, second-guessing state court decisions. Congress clearly stated in the AEDPA that deference must be given to state court judgments which are reasonable. The decisions of the Supreme Court of Kentucky in this case were nothing if not reasonable.

Further, Petitioner's argument concerning the constitutionality of the standard of review contained in the AEDPA has been held meritless by several circuit courts. See Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir., 2000); Green v. French, 143 F.3d 865, 874-75

(4th Cir., 1998), abrogated on other grounds, Williams v. Taylor, *supra*; Lindh v. Murphy, 96 F.3d 856, 871-72 (7th Cir., 1996), overruled on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

III.

THE SIXTH CIRCUIT GAVE PROPER DEFERENCE TO THE DECISIONS OF THE SUPREME COURT OF KENTUCKY, WHICH THE DISTRICT COURT FAILED TO DO.

The District Court in reaching its decision placed itself in the position of a superior state court and merely disagreed with the result reached by the Kentucky Supreme Court. This, however, is not the standard of review required under the AEDPA. No, the decisions of the Supreme Court of Kentucky are entitled to deference if they are not contrary to, and do not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or are not based upon an unreasonable determination of the facts in light of the evidence. 28 U.S.C. Section 2254(d).

Here, the decisions of the Kentucky Supreme Court were entirely reasonable and must be given deference. Just because the District Court disagreed with the result reached by the Supreme

Court of Kentucky does not mean that the decision of the Supreme Court of Kentucky was unreasonable. Cf., Ungar v. Sarafite, 376 U.S. 575, 86 S.Ct. 841, 850, 11 L.Ed.2d 921 (1964) ("But the fact that something is arguable does not make it unconstitutional."). The District Court did not give proper deference to the decision of the Supreme Court of Kentucky and the Sixth Circuit, with its review of the District Court, restored that deference to the process.

Concerning Dr. Shaler's testimony, Petitioner relies upon the District Court's criticism of the majority opinion in Brown's CR 60.02 appeal: specifically, that the Commonwealth did mention the blood on Petitioner's boots at closing argument and stated that one in 25 people had that type of blood, including the victim. This criticism goes to the Kentucky Supreme Court's finding that Dr. Shaler was not a key witness and that his testimony was not an important item of evidence. However, a review of the Commonwealth's closing argument reveals only one mention in passing of the blood on the boots being of the type that the victim possessed and being relatively rare (one out of 25 people). The rest of the closing argument was a careful marshaling of all of the evidence which pointed to Petitioner's guilt - the one reference to Dr. Shaler's testimony was minuscule

compared to the whole argument. Further, the fact that Petitioner's boots had any blood on them at all (Petitioner did not offer any explanation whatsoever for the blood) and that he traded his boots for some old boots on the morning after the murder has significant impact which is completely independent of Dr. Shaler's testimony. The District Court credited Dr. Shaler's testimony with much more weight then it deserved given the entire case against Petitioner. The mere fact that Dr. Shaler was an expert giving "expert" testimony would not carry any special aura given that the substance of the testimony was not of a "smoking gun" variety, but was more of a "just one more piece in a bigger picture" variety. This view is bolstered by the fact that the Commonwealth only referenced Dr. Shaler's testimony in passing at closing argument.

Given the entire case against Petitioner, the rulings of the Supreme Court of Kentucky, and the standards of review under 28 U.S.C. §2254(d) the District Court erred in indicating that it would hold that the admission of Dr. Shaler's testimony merits habeas relief absent a procedural bar. The District Court ignored the standards involved and substituted its judgment in place of the judgment of the Supreme Court of Kentucky. However, there was nothing

unreasonable about the Kentucky Supreme Court's decisions: the District Court could disagree with the decisions but it could not fairly say that they were unreasonable.

As for the continuance issue, it is, of course, inextricably tied to the issue of whether Dr. Shaler's testimony was erroneously admitted at trial. If Dr. Shaler's testimony was of little importance, would not, if it had been excluded, have affected the outcome of the trial, as the Supreme Court of Kentucky found, then the failure to grant a continuance to prepare for Dr. Shaler's testimony could not have been error, because no prejudice could be shown. Further, the Supreme Court of Kentucky found that Petitioner's counsel "conducted a skillful and penetrating cross-examination. . ." of Dr. Shaler. Brown v. Commonwealth, 639 S.W.2d at 760. The Court also held that Petitioner was not unfairly prejudiced by the refusal to grant a continuance. Id., at 761. Given the standards of review contained in 28 U.S.C. §2254(d) the District Court erred in determining that this issue would merit federal habeas corpus relief absent a procedural bar. The decisions of the Supreme Court of Kentucky were not unreasonable and the District Court should not have substituted its judgment for the reasonable judgment of the

state court. The decisions of the Supreme Court of Kentucky should be respected. The fact that the District Court would have decided differently is not enough. Cf., Ungar v. Sarafite, 376 U.S. 575, 85 S.Ct. 841, 850, 11 L.Ed.2d 921 (1964) ("These matters are, of course, arguable, and other judges in other courts might well grant a continuance in these circumstances. But the fact that something is arguable does not make it unconstitutional.").

IV.

PETITIONER'S CLAIM REGARDING PROSECUTORIAL MISCONDUCT WAS NOT PROPERLY BEFORE THE SIXTH CIRCUIT AND FURTHER THE SIXTH CIRCUIT IMPLICITLY DECIDED THAT CLAIM AGAINST PETITIONER.

Petitioner complains that the Sixth Circuit did not address his prosecutorial misconduct claim. However, the misconduct claim was not properly before the Sixth Circuit, since Petitioner had failed to raise it in his original brief before that Court and only raised it for the first time in his reply brief. This represented a waiver of the misconduct issue, and thus it was not properly before the Sixth Circuit, and is not properly before this Court. Furthermore, even if the issue was properly before the Sixth Circuit it must be assumed that that Court found it to contain no merit.

Further, if the substance of the issue is examined, then clearly the District Court correctly determined that Petitioner had procedurally defaulted his closing argument issue. Petitioner did not make any objections to the Commonwealth's closing argument in this case. Under Kentucky law a contemporaneous objection is necessary in order to preserve an issue for appellate review. RCr 9.22. On appeal, the Supreme Court of Kentucky did not directly address Petitioner's closing argument issue in its 1982 opinion, saying only that it found no merit in the remaining issues. In Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) this Court held that the failure of a federal habeas petitioner to comply with a state's contemporaneous objection rule must show cause and prejudice for the procedural default in order to obtain review on the defaulted claims. Further, in Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) this Court held that if the last state court to review the issue does not rely upon the procedural bar, the bar is not applied if the decision rests primarily on federal law. Here, of course, there is no reason to believe that the Supreme Court of Kentucky did not rely upon the procedural bar, but also there is no reason to believe the decision rested in any way on federal law, so the bar must

stand and this issue is procedurally defaulted. Cf., Simpson v. Sparkman, 94 F.2d 199, 203 (6th Cir., 1996) (When the state court is silent as to its reasons for denying a claim "we will not assume that the court did not observe the applicable procedural bar. Instead, we will assume that had the state court addressed the petitioner's . . . claims, it would not have ignored its own procedural rules and would have enforced the procedural bar.") Petitioner's claims of actual innocence are completely unsubstantiated: Petitioner did not take the stand at his trial to proclaim his innocence and he has never offered any other evidence of his innocence. Moreover, the evidence was more than sufficient to allow a reasonable jury to find guilt beyond a reasonable doubt. Finally, if the merits of this issue are reached, it is clear that the comments of the prosecutor were not so egregious as to render the trial fundamentally unfair. Petitioner's counsel commented on closing concerning the fact that Petitioner had elected not to testify. Plus, the prosecutor's comment concerning Petitioner's lack of a defense was not commenting on Petitioner's silence, but was a response to the fact that none of Petitioner's witnesses testified about the facts of this murder. Foster v. Commonwealth, Ky., 415 S.W.2d 373, 375 (1966), cert. denied 388

U.S. 914; Fanelli v. Commonwealth, Ky., 418 S.W.2d 740, 743 (1967). As to the prosecutor's comments about the various items of evidence, the respondent notes that it is proper to argue the sufficiency of the evidence in closing arguments. The Commonwealth was merely commenting upon the unique combination of evidence which linked Petitioner to the crime in this case of circumstantial evidence. Cf. Alexander v. Commonwealth, Ky., 457 S.W.2d 472 (1970); Beasley v. Commonwealth, Ky., 339 S.W.2d 179 (1960) Further, it was not such an argument that would have led to confusion by the jury. Cf., United States ex rel. DiGiacomo v. Franzen, 680 F.2d 515, 519 (7th Cir., 1982). Finally, the evidence showed that Petitioner and Mark were together at every crucial step which led to this murder. While Mark did most of the talking, Petitioner never disagreed and at times joined in. "They" were enveloped by their acts. Brown v. Commonwealth, 555 S.W.2d at 256. The prosecutor certainly did not render the trial fundamentally unfair.

CONCLUSION

WHEREFORE, certiorari review should be denied.

Respectfully submitted,

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